

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 January 2016

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information relating to the costs associated with professional conduct panel hearings. The Department for Education (DfE) complied with some of the requests but considered that the information relating to two requests, which form the focus of this notice, was exempt information under section 43(2) (commercial interests) of FOIA. Section 43(2) is qualified by the public interest test and the DfE found that on balance the public interest favoured maintaining the exemption.
2. The Commissioner has determined that neither of the two requests engages section 43(2) of FOIA and therefore requires the DfE to disclose the specified information to ensure compliance with the legislation.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 2 April 2015, the complainant wrote to the DfE and submitted the requests quoted below. These relate to professional misconduct cases investigated by the National College for Teaching and Leadership (NCTL), an executive agency sponsored by the DfE, and the NCTL's forerunner, the Teaching Agency.

1. Please provide detail of the total cost to the NCTL (and Teaching Agency) for the instruction of external solicitors and barristers in investigating and bringing cases to Professional Conduct Panel hearings from 2010 to the current date. It would be helpful if this figure could be broken down by financial year.

2. [(a)] Please provide a list of the names of firms of solicitors/lawyers instructed by the NCTL (and TA) to undertake work in relation to Professional Conduct Panel hearings. [(b)] Please also provide a breakdown of the total fees paid to each firm of solicitors for work undertaken in relation to Professional Conduct Panel hearings.

3. Please provide detail of the competitive tendering process for the appointment of external solicitors/lawyers in bringing Professional Conduct Panel hearings.

Specific cases

4. Please provide detail of the total estimated cost to the NCTL/TA of investigating and bringing a Professional misconduct case in the following specific cases:

i) The NCTL and [named individual]

ii) The NCTL and [named individual]

iii) The Teaching Agency and [named individual]

iv) The NCTL and [named individual]

v) The NCTL and [named individual]

vi) The NCTL and [named individual]

5. The DfE responded on 5 May 2015. It provided the complainant with the information caught by requests 2(a) and 3 but said the 'commercial interests' (section 43(2)) exemption in FOIA applied to the remaining requests and that the public interest favoured withholding the information.
6. The complainant contacted the DfE again on 8 June 2015 in order to challenge its application of section 43(2) of FOIA. The DfE therefore carried out an internal review, the outcome of which was provided to the complainant on 23 June 2015.
7. With regard to request 1, the reviewer found that relevant information could be disclosed. In making this disclosure, the DfE explained that the Teaching Agency (subsequently renamed as the NCTL) did not exist

prior to April 2012 and its predecessor regulator had a different remit and costs. For this reason, the reviewer confirmed that the information released would be restricted to the periods: 1/4/2012 – 31/3/2013; 1/4/2013 – 31/3/2014; and, 1/4/2014 – 31/3/2015. In relation to requests 2(b) and 4, the reviewer found that section 43(2) and the corresponding public interest test had been applied correctly.

Scope of the case

8. The complainant contacted the Commissioner to complain about the DfE's refusal to disclose the information described by requests 2(b) and 4.
9. During the course of the Commissioner's investigation the DfE affirmed its reliance on section 43(2) of FOIA to withhold the information covered by these requests. The Commissioner analysis of the application of the exemption follows in the body of this notice.

Reasons for decision

Background

10. The DfE has helpfully provided the Commissioner with some background information relating to the role of the NCTL in order to give its submissions some context.
11. It explains that the NCTL is responsible for regulating the teaching profession in England. This includes investigating cases of serious teacher misconduct. On the basis of its findings, the NCTL will decide whether to refer a case to a professional conduct panel. The panel will then make a determination on whether a prohibition order should be issued.
12. The NCTL's website¹ states that it is the Education Act 2011 which gives responsibility to the Secretary of State for Education to regulate the teaching profession in England and to hold a list of teachers who have been prohibited from teaching. The Teachers' Disciplinary (England) Regulations 2012 (the Regulations) provide information about the arrangements. The NCTL operates the Regulations on behalf of the

¹ <https://www.gov.uk/guidance/teacher-misconduct-regulating-the-teaching-profession>

Secretary of State, which apply to all people carrying out teaching work in England, including all schools, sixth form colleges, children's homes and youth accommodation.

13. The Regulations cover cases of serious misconduct, which is deemed to be when a teacher's behaviour is fundamentally incompatible with being a teacher and could lead to them being prohibited from teaching. The Regulations do not cover the cases of less serious misconduct, incompetence or under-performance. A teacher's employer should deal with these cases.
14. With regard to professional conduct panels, the NCTL's website advises that panel members are recruited through a public appointments process. A panel consists of 3 members, and will include: a teacher, or someone who has been a teacher in the previous 5 years; and a layperson, specifically not from the teaching profession. One of the panellists will be appointed to act as chair. A legal adviser is present to advise the panel on the legal process. They cannot be a member of the DfE and will take no part in the decision-making process.
15. The teacher will be able to submit relevant evidence and will be given the opportunity to comment on all the evidence that the NCTL is considering relating to their case.

Section 43(2) – commercial interests

16. Section 43(2) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
17. A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services. Types of information that may affect commercial interests include, among other items, details relating to the procurement of goods and services and information concerning a public authority's own purchasing position.
18. The commercial interests exemption is subject to the test of prejudice. Previous decisions of the Commissioner and differently constituted Information Tribunals have agreed that this test requires a public authority seeking to apply section 43(2) to demonstrate that three conditions are satisfied.
19. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable factor described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is

designed to protect against. Third, there is a real risk of prejudice arising through disclosure, with a public authority able to demonstrate that either disclosure 'would' or 'would be likely to' have a prejudicial effect. Section 43(2) of FOIA is also qualified by the public interest test. Accordingly, where the exemption is found to be engaged on the basis that the prejudice test is met, a public authority must go on to consider whether the balance of the public interest favours disclosure.

20. In general, the DfE has not made a distinction between the requests when making its arguments supporting the application of section 43(2) of FOIA. With regard to both requests, it considers that the NCTL's commercial interests and the commercial interests of the legal firms referred to in the DfE's response to the complainant may be harmed by disclosure. With regard to the NCTL's commercial interests, the DfE considers that knowledge of the fees paid would be likely to affect the responses of legal firms to future tenders for work, making this process less competitive and less likely to offer the best value for public money. In respect of the commercial interests of each of the legal firms, the DfE considers that the fee information could be exploited by competitors tendering for work.
21. The Commissioner accepts that the nature of the harm which the DfE has claimed may arise through disclosure is relevant to the exemption. He has therefore gone on to consider whether the DfE has made a link between the actual information that has been requested and the prejudice cited. For the reasons explained, the Commissioner's view is that it has not.
22. A key part of the DfE's position refers to the charging system connected to professional misconduct cases. In particular, it considers that the very fact that the charge system is fixed means 'it is very easy for other firms to calculate the costs per case when looking at the total sum paid to each firm divided by the number of cases each firm has conducted.'
23. According to the DfE, the NCTL undertakes a 'further competition' against the Government Procurement Service framework for legal services requesting work to tender against a matrix of fixed prices. In the DfE's view, it would be relatively straightforward to determine the number of cases a particular contractor has completed (through the gov.uk website that publishes decisions on cases) and therefore the average unit cost, were the fees disclosed.
24. It is argued that the assumptions made could allow competing firms to seek to undercut prices when bidding against the named firms for future contracts. The DfE further asserts that disclosure could hinder a firm's ability to tender freely for similar contracts, as disclosure could lead to an expectation among existing or prospective clients that the same

charging mechanism would be used, when the same strategic or other reasons that drove the current arrangements may not apply. Existing clients may also question their own arrangements, which could result in a loss of business confidence or reputation.

25. The distortion of the tender process would likewise have an effect on the NCTL's commercial interests. The DfE explains that these interests relate to the NCTL's ability to achieve best value for public money for high quality services. For this aim to be achieved, the NCTL is reliant on a vibrant market, in which good quality, competitive bids are received. Should legal firms be discouraged from taking on work because of the effects of disclosure, this would impact on the quality of the legal advice provided; advice which is crucial for securing an appropriate outcome by a panel that on account of its role will inevitably be dealing with serious issues.
26. The Commissioner has probed the way in which the disclosure could lead to the outcomes described by the DfE by asking for a more detailed explanation of how the withheld information could be used to 'calculate the costs per case when looking at the total sum spent paid to each firm divided by the number of cases each firm has conducted.' In relation to the commercial interests of the NCTL, the Commissioner has also queried whether disclosure would in fact benefit the public purse by driving down costs as a result of rival firms attempts to undercut their rivals.
27. With regard to the process of drilling down to a firm's charging regime using the requested information, the DfE has provided the following explanation:
 - a. *The outcome of all misconduct hearings where misconduct has been found are published on the GOV.UK website. Part of the detail covered in these publications is the name of the legal firm used. So should we publish the amount of funding received each year by firms working on behalf of the NCTL, it would be easy to take these annual costs, visit the GOV.UK website and note the number of hearings each firm covered. Dividing the annual costs per firm by the number of hearings covered would give a cost per hearing.*
 - b. *However, this cost per hearing would give an erroneous and over-inflated figure. This is because it may not cover such areas as pre-case preparatory work including considering case papers, preparing initial case reports and interviews etc. [...] This form of calculation would certainly not cover all hearings where misconduct was not found, as such cases are not published on the GOV.UK website unless the teacher involved requests it.*

- c. The fact that the estimated figure would be artificially high may cause issues for the department from a commercial perspective and would put existing contracted firms at an unfair advantage, as potential firms bidding may outprice themselves due to the incorrect costings they have come to. This in turn could reduce the size and quality of the market the department has access to when it comes to tendering, as firms may not be successful due to their higher costings, thus the department may be unable to procure new high quality firms as suppliers. It may also cause the department reputational damage, should such firms feel that they have been misled and that they wasted their own time and resources creating a bid on the back of incomplete data.*
28. In relation to the DfE's arguments pertaining to the weakening of its ability to maximise value for money, the DfE said the following:
- 9. If the costs are released this would not automatically lead to improved value for money for the department and may, in fact, lead to the opposite. For example, Firm A is an existing supplier that is paid £3,000 per case. When a tender exercise begins, Firm B considers bidding at a charge of £2,000 per case. However, the release of Firm A's charge of £3,000 leads to Firm B deciding not to bid at £2,000, but at £2,750 knowing that this charge would still undercut Firm A. Thus the best value cost is not achieved and it would, in fact, place both the department and the existing supplier (Firm A) at a commercial disadvantage.*
- 10. [...] A firm which proposes the lowest charge may also be proposing to deliver a level of quality or service which is below that of which the department would expect, and thus would not provide value for money.*
29. In previous decisions concerning the application of section 43(2) to details of legal fees, the Commissioner has separated information documenting the total legal fees spent by a public authority from information that itemises how the fees were made up, particularly where the itemisation will reveal a legal firm's hourly rate model. In the Commissioner's view, only the latter category of information would normally engage the exemption.
30. This approach was demonstrated in the decision notice served on the General Dental Council ([FS50563391](#), 18 August 2015), in which the Commissioner considered the application of section 43(2) of FOIA to a request made for details of legal fees incurred in relation to the General Dental Council's investigating committee. The Commissioner's determination that section 43(2) was not engaged was based primarily in that situation on the lack of evidence provided by the General Dental

Council to support its position. The Commissioner did, however, go on to outline his general position with respect to requests for legal fees:

16. Even if the GDC had provided a more substantive argument, the Commissioner would still be sceptical about any claim that disclosure of fees paid to a particular legal firm would prejudice future, unspecified negotiations. The information requested is the total fees spent. The complainant has not asked for the fees to be broken down in any way. For instance, he has not asked for the number of hours involved or the type of legal advice or assistance that was offered. Therefore it is very difficult to see how disclosure of the requested information would provide any kind of commercial advantage as a competitor would not know on what basis these legal fees had been negotiated.

31. The Commissioner's position is further evidenced in his decision involving the University of Sussex ([FS50541023](#), 18 September 2014). In that case, the Commissioner was required to consider the University's application of section 43(2) of FOIA to details of the costs it had incurred in seeking legal advice about an internal review response provided in connection with a freedom of information request. The Commissioner decided the exemption applied in that situation, finding the following important:

14. Pinsent Masons LLP stated that the withheld information in this case is the cost it charged for a discrete piece of work (the internal review response of 12 March 2014) which is now in the public domain. It believes legal professionals could reasonably estimate the length of time taken to produce this response and rival firms, with relative ease, could reverse engineer its fee for the response to arrive at a close estimate of the hourly rate it charges the university for information law work. Pinsent Masons LLP confirmed that this is distinct from a public authority disclosing its aggregate legal expenditure or expenditure per firm (which, in any event, would not usually be accompanied by the attendant work which those firms have produced) in which no reverse engineering exercise would be possible.

15. Pinsent Masons LLP advised that it understood different responses under the FOIA will require differing levels of effort and cost on the part of the law firm appointed. However, it is its hourly rate model on which the majority of commercial law firms operate which it regards as commercially sensitive rather than a flat rate for producing documents of differing lengths. Pinsent Masons LLP believes its hourly rate could be determined with some accuracy from the withheld information and the piece of work it completed, which is in the public domain. Once the hourly rate has been

extrapolated this can then be applied to a range of requests of varying complexity.

32. The decision notice continues at paragraph 16 by setting out how Pinsent Masons considered disclosure could have a prejudicial effect, which included the possibility that rival firms could use the information to undercut it and lead to existing clients of Pinsent Masons to question the costs they had incurred for what they believed was similar work. The Commissioner ultimately accepted the arguments that said placing details of the legal fees in the public domain could have a prejudicial effect.
33. The circumstances of the cases plainly differ. Nevertheless, there are some similarities between the nature of the prejudice arguments presented and the Commissioner considers that the general principles underpinning the General Dental Council and University of Sussex decisions are transferable. In particular, a legal firm's fees model emerges as the clearest example of information that is likely to be commercially sensitive.
34. The Commissioner has found, however, that the examples of prejudice cited by the DfE are not borne out by its explanations. Specifically, the DfE has not demonstrated that disclosure would allow a person to calculate a legal firm's fees model through reverse engineering, which is the crux of the DfE's arguments concerning the harm to its own commercial interests and the commercial interest of the third parties.
35. With regard to request 2(b), the DfE has interpreted 'breakdown' to mean the cost per financial year paid to each firm of solicitors for work carried out in relation to professional misconduct hearings. The DfE has suggested that the commercial sensitivity of the information is generated by the possibility that a person could arrive at a legal firm's fees model by dividing the annual costs per firm by the number of hearings covered. For the purposes of the application of section 43(2), the Commissioner considers that this argument is problematic.
36. The DfE itself has pointed out that the disclosure would not allow a person to work out accurately the hourly rate charged by a legal firm. This is because the calculation would not cover all forms of a legal firm's work – for example, where an allegation of misconduct is not upheld – and therefore would be inflated. The principal issue is therefore the potentially misleading impression created by the disclosure; an effect that the Commissioner does not accept would engage the exemption.
37. The Commissioner is sceptical of the claim that a rival legal firm competing for a tender would tailor its bid on information that it had not properly researched and checked. This, in the Commissioner's view,

would be the most basic requirement of a commercial entity attempting to secure a successful bid. In any case, if the DfE was truly concerned about the misleading nature of the information, it would have the option of accompanying the disclosure with an explanatory statement.

38. In relation to request 4, when testing the relevance of the DfE's arguments it is necessary to return to the information that has actually been requested. It is significant in the context of the application of section 43(2) of FOIA is that the complainant is seeking the estimated cost of *investigating and bringing* a particular professional misconduct case, which will not only include legal costs but other activities as well. In this regard, the DfE has confirmed that its estimates encompass legal fees, panellists' expenses and overnight accommodation for panellists and witnesses. In short, the request is wider than one which asks simply for a breakdown of the legal fees charged in respect of a particular case; information that is more likely to be commercially sensitive.
39. The DfE has not explicitly set out why it considers the scope of the request would not affect its ability to use the exemption. From the Commissioner's own analysis, he accepts that there will normally be a relationship between the complexity of the issues considered by a panel in a professional misconduct case and the costs incurred in investigating and bringing the case. Based on the information provided, however, the Commissioner does not accept that a person could extrapolate a legal firm's fees model through a process of comparing a published misconduct case decision against the total costs requested.
40. For these reasons, the Commissioner has decided that for both requests, 2(b) and 4, a link has not been established between the prejudice claimed and the information requested. The Commissioner has therefore found that the exemption is not engaged.
41. As a postscript to this decision, the Commissioner would make the following clarification relating to the application of section 43(2) of FOIA. Where a public authority considers that the commercial interests of a third party are at stake, the Commissioner will not take into account any speculative arguments advanced by the authority about the nature of the prejudice and how it may occur. This follows the approach adopted by the Information Tribunal in *Derry City Council v Information Commissioner* ([EA/2006/0014](#), 11 December 2006). In finding that the Council had not received representations from the third party, in this case Ryanair, which it had argued would be affected by the disclosure of the requested contractual information, the Tribunal said:

24. (b) [...] Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we

are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.

42. The DfE has provided the Commissioner with evidence that one firm had objected to the disclosure of the requested information. The Commissioner has considered carefully the arguments put forward by the firm but has ultimately concluded that there is insufficient evidence to support the application of the exemption to that firm's information. The Commissioner notes though that he has not received submissions from any other firms in relation to the request. In accordance with the *Derry City Council* decision, where the Commissioner is not provided with evidence of a third party's views he will not produce arguments on behalf of the third party and will have no grounds upon which to assume that the third party does in fact oppose disclosure.

Right of appeal

43. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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